

GBHABERApS

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

16-cr-746 (PKC)

5 DAVID BERGSTEIN and
6 KEITH WELLNER,

7 Defendants.
-----x

8 New York, N.Y.
9 November 17, 2016
10 12:40 p.m.

11 Before:

12 HON. P. KEVIN CASTEL

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

18 BY: EDWARD A. IMPERATORE, ESQ.
19 ROBERT W. ALLEN, ESQ.

20 Assistant United States Attorneys

21 THOMAS H. HENRY BIENERT, JR., ESQ.

22 STEVEN J. KATZMAN, ESQ.

23 Attorneys for Defendant Bergstein
24 Bienert, Miller & Katzman, PLC

25 JOSHUA KLEIN, ESQ.

Also Present: Mark S. Olinsky, ESQ.
26 Sills Cummis & Gross

GBHABERApS

1 Shannon Bieniek
2 Special Agent
3 Federal Bureau of Investigation

4 Kurt Hafer
5 Investigator
6 U.S. Attorney's Office

GBHABERApS

1 (In open court)

2 THE CLERK: United States of America v. David
3 Bergstein and Keith Wellner.

4 For the government, please.

5 MR. IMPERATORE: Good afternoon, your Honor. Edward
6 Imperatore and Robert Allen for the government. With us at
7 counsel table are Special Agent Shannon Bieniek with the FBI
8 and Kurt Hafer, an investigator with the U.S. Attorney's
9 Office.

10 THE COURT: All right. Good afternoon.

11 And for the defendants.

12 MR. BIENERT: Good morning, your Honor. Thomas
13 Bienert Jr. and Mr. Katzman on behalf of Mr. David Bergstein,
14 who is present on bond.

15 THE COURT: All right.

16 MR. KLEIN: Good afternoon, your Honor. Josh Klein.
17 I'm here on behalf of Mr. Keith Wellner.

18 I would ask the Court if the Court would permit me to
19 appear today for arraignment purposes. We are trying to work
20 out a retention arrangement. We had been representing
21 Mr. Wellner before the indictment, and we're talking about
22 whether or not we can continue. And if the Court would allow,
23 I would make that request.

24 THE COURT: All right. I'm going to allow it. But I
25 want to tell you that this has to be resolved by -- let me give

GBHABERApS

1 you a date, because Mr. Wellner will either have worked this
2 out, or he will represent himself pro se, or, if he can fill
3 out a truthful affidavit of need, I may appoint counsel for
4 him. But I will not allow this to go on for weeks or anything
5 approximating weeks. So let me give you a date for you to come
6 back if this is not resolved.

7 November 29 at 11 a.m. -- 11:30, make that. And that
8 is a conference. And you will notify me in advance whether you
9 have filed a notice of appearance and I can vacate the
10 conference, and if you haven't filed a notice of appearance,
11 that will be the date when I will hear from Mr. Wellner as to
12 whether he wishes to represent himself, have some other lawyer,
13 or is eligible under the Criminal Justice Act.

14 MR. KLEIN: Understood, your Honor. Thank you.

15 THE COURT: All right. And that should be explained
16 to your client.

17 MR. KLEIN: Understood.

18 THE COURT: All right. Now let me begin with
19 Mr. Bergstein's counsel. Has the defendant in fact received,
20 reviewed, and discussed with you the indictment in this case?

21 MR. BIENERT: Yes, your Honor.

22 THE COURT: Is there an application to waive the
23 public reading thereof?

24 MR. BIENERT: Yes, your Honor.

25 THE COURT: Mr. Bergstein, how do you plead? Guilty or

GBHABERApS

1 not guilty?

2 DEFENDANT BERSTEIN: Not guilty.

3 THE COURT: All right. Mr. Wellner's counsel, has he
4 received the indictment, reviewed it, and discussed it with
5 you?

6 MR. KLEIN: Yes, your Honor.

7 THE COURT: Is there an application to waive the
8 public reading?

9 MR. KLEIN: Yes, your Honor.

10 THE COURT: And, Mr. Wellner, how do you plead to the
11 indictment? Guilty or not guilty?

12 DEFENDANT WELLNER: Not guilty, your Honor.

13 THE COURT: All right. Mr. Imperatore, let me hear
14 from you as to the volume of discovery in this case and when
15 you anticipate having discovery complete.

16 MR. IMPERATORE: Yes, your Honor. The volume of the
17 discovery in this case is roughly 150 gigabytes. It consists
18 of three principal components, among others. They include,
19 first, documents produced by Weston, which is the financial
20 advisor that is the subject of the indictment, principally
21 e-mail communications among the defendants and others. The
22 second component are bank records, brokerage records, and other
23 business records that were produced by roughly 100 entities,
24 principally in response to subpoenas. And the third component
25 are Gerova concordance databases. The government believes that

GBHABERApS

1 this third component, the Gerova databases, are tangential at
2 beast in relationship to this case, but we are nevertheless
3 producing them out of an abundance of caution.

4 THE COURT: And out of the volume of materials, what
5 percentage is the Gerova material?

6 MR. IMPERATORE: I believe it is roughly 75 gigabytes,
7 which would be about half.

8 THE COURT: OK.

9 MR. IMPERATORE: And so in terms of the production
10 timing, the government is prepared to produce substantially all
11 the discovery at this time. What we've asked of defense
12 counsel by e-mail last night would be to provide the government
13 with a 300-gigabyte hard drive. We will load that with the
14 discovery for the defendants and send it back. We understand
15 from our IT department it will take several days to accomplish
16 that because of the logistics of copying the material. But
17 we're essentially at a point where we can make a very
18 substantial production now.

19 THE COURT: All right. So when do you think your
20 production will be complete?

21 MR. IMPERATORE: I would estimate, your Honor, two
22 weeks.

23 THE COURT: All right. And defense counsel are going
24 to need time to review the produced materials, discuss them
25 with their client, and be in a position to advise the Court

GBHABERApS

1 whether there are any motions the defendants wish to make in
2 this case. Let me see whether I can give you a date to come
3 back. I have some flexibility. So why don't you tell me how
4 much time you think you need.

5 MR. BIENERT: Thank you, your Honor. And government
6 counsel and I -- and I don't know if Mr. Wellner's counsel was
7 able to speak, but we at least spoke outside. And if we assume
8 that we get the stuff by the end of the month and have about a
9 month to review it, we would hope to set the status hearing or
10 update for the Court after the 1st. I will say for selfish
11 reasons, because my five kids are out of school the first week
12 of January, I would want to make it, say, January 8th on,
13 whatever time works for your Honor.

14 THE COURT: All right. And is that consistent with
15 Mr. Wellner's position?

16 MR. KLEIN: Yes, your Honor. I think sometime in
17 January is fine. It's my experience that in these types of
18 cases with this amount of data, we would normally have to use a
19 data vendor and it would be an additional period of time,
20 probably up to a week, during which they would have to process
21 it.

22 THE COURT: All right. Let me see when I can get you
23 a date.

24 While I'm doing that, is there an issue with
25 Mr. Bergstein's counsel in this case, in terms of your

GBHABERApS

1 admission or the like?

2 MR. BIENERT: Yes, your Honor. We submitted
3 everything. And then we got word back from the clerks, in
4 California we typically show that we're in good standing by a
5 certification from the state bar, and we were informed
6 yesterday that your Clerk's Office downstairs wants it to be
7 from the state supreme court. Frankly we've never heard of it
8 done that way, but we're going to get back and try to get
9 something from the state supreme court. I don't know how hard
10 or easy that is, because it's always been through the state
11 bar.

12 THE COURT: Well, it's best that you raise an issue
13 like that at the outset, so that I know you're not admitted
14 either for all purposes or pro hac, before you begin. But my
15 deputy just informed me of that. That's the only reason I
16 would know.

17 MR. BIENERT: Well, we spoke with your deputy about
18 it. We were expecting to address it. I didn't want to inter--
19 I didn't know when you wanted us to talk about it. So my
20 apologies, Judge.

21 THE COURT: OK. January 19 at noon.

22 Is there anything further from the government?

23 MR. IMPERATORE: Yes, your Honor. Just briefly on
24 discovery, we had proposed two days to -- two days ago a
25 proposed protective order to counsel. We will confer with

GBHABERAPS

1 counsel on that language, and we hope to reach an agreement.
2 And we'll submit to the Court a proposed protective order.

3 THE COURT: I will endeavor to act on that as soon as
4 I get it.

5 MR. IMPERATORE: Separately, Keith Wellner's bail was
6 set last week, because he was arrested in this district. This
7 is the initial appearance for David Bergstein. So his bail
8 will need to be set today. And parties have reached an
9 agreement with respect to bail conditions for the Court's
10 consideration, with one or two exceptions, which we'll bring to
11 the Court's attention.

12 THE COURT: Yes.

13 MR. IMPERATORE: The parties have agreed that it will
14 be a \$2 million bond, secured by \$600,000 in real property,
15 specifically a property located at 3907 Edgehill Drive, in Los
16 Angeles, regular pretrial supervision. The bond will be
17 co-signed --

18 THE COURT: Edgehill Drive is where, now?

19 MR. IMPERATORE: Los Angeles, California.

20 THE COURT: OK. I got it.

21 Go ahead.

22 MR. IMPERATORE: The bond will be secured -- I'm
23 sorry -- will be co-signed by two financially responsible
24 persons. There will be regular pretrial supervision, surrender
25 of all travel documents and no new applications, and no contact

GBHABERAPS

1 with victims for co-defendants.

2 THE COURT: Except in the presence of counsel.

3 MR. IMPERATORE: Correct.

4 And so I believe those are the agreed-upon conditions.

5 There are two conditions that the parties disagree on.

6 The first relates to travel. It's the government's view that
7 travel should be restricted to California, the Southern
8 District of New York, and Eastern District of New York. I
9 understand that the defense may seek nationwide travel and are
10 prepared to address that with your Honor.

11 The second issue -- I'm not sure there is a
12 disagreement, but the government is seeking surrender of all
13 firearms, which is a recommendation of Pretrial Services.
14 Pretrial has noted in the pretrial report that the defendant
15 has a number of firearms in his residence, and has recommended
16 that they be surrendered to a local police department. In
17 accordance with that recommendation, the government is seeking
18 that. We understand that the defense may disagree as to where
19 they should be surrendered.

20 THE COURT: Let me hear defense counsel.

21 MR. BIENERT: Thank you, your Honor. And I agree with
22 the recitation by counsel as to what we agree on. And a few
23 things I wanted to address.

24 First of all, in terms of travel, we would ask that he
25 be allowed nationwide travel. And here's why. My client's

GBHABERApS

1 company is an advisory consulting company. And totally
2 independent of this business deal that's at issue in this case,
3 which is a 2011 deal, at any given time he's got 12 active
4 deals. And deals involve a lot of mergers and acquisitions
5 stocks. It involves a lot of scouting out of companies that
6 could be in any different parts of the country. And it
7 involves not only travel with the active cases now, to -- for
8 example, he actively is traveling on a fairly regular basis to
9 New Jersey, Texas, Ohio, Illinois, and Nevada. But the nature
10 of his business, which involves things as wide ranging as food
11 products as well as things related to airplanes and other types
12 of industries, as well as film industry things, his company
13 could get a call tomorrow about a prospective client to go talk
14 to, hypothetically, in Tennessee or anywhere else.

15 THE COURT: How many employees are there of the
16 company?

17 MR. BIENERT: 22.

18 THE COURT: And what is his position with the company?

19 MR. BIENERT: CEO, your Honor.

20 And just to be clear, there are many more people to
21 talk to in deals that he doesn't go talk to people on. It's a
22 very small percentage. But oftentimes he needs to get involved
23 when they want to speak to him. So for that reason, we would
24 just ask that he have nationwide travel.

25 THE COURT: And what's the other issue?

GBHABERApS

1 MR. BIENERT: Well, as an aside to that, while we're
2 on travel, I alerted prosecutors, his wife and two kids and he,
3 as well as another family, have a prepaid trip December 16 to
4 -- I'm sorry -- December 16 to 23, one week, in Turks and
5 Caicos. So we are asking if he could do that. The prosecutor
6 told me they don't typically agree to out of the country. So
7 we wanted to ask that we could provide to pretrial as well as
8 the government the exact itinerary of where they are, where
9 they're staying, etc.

10 THE COURT: Why don't you do that and write me a
11 letter regarding the trip, and I'll act on it promptly.

12 MR. BIENERT: Thank you, your Honor.

13 Finally, on the other issue, the firearms, obviously
14 we agree, first of all, he self-reported the firearms. We
15 agree that under the rules he should not have firearms. But at
16 least in our district the way it would typically be done, since
17 they're legal and there's nothing inherently illegal about
18 them, is that he would get a responsible third party or
19 relative. They would go to wherever they keep them at a
20 different house. He would not have control of them or not
21 access them, as opposed to going to a police department.

22 So we would ask that he be allowed, given a reasonable
23 amount of time, to just make sure the firearms are out of his
24 possession and control.

25 THE COURT: Who? And what circumstances will they

GBHABERAPS

1 hold? I mean, you know, that's the rub.

2 MR. BIENERT: Right. Well, and I guess I would just
3 offer to your Honor that, clearly, the way we would typically
4 done in our district, is, he knows he can't have the firearms.
5 He's not going to control them.

6 THE COURT: I understand this is how it's done in the
7 Central District of California. I'm asking the question, who
8 is going to have the firearms? That's the question.

9 (Defense counsel and client confer)

10 MR. BIENERT: I'm realizing it's a law in force, but
11 we would ask that he be able to deposit them with the Manzanita
12 Police Department, which is in San Diego County, with the chief
13 of police there, and we can provide the name.

14 THE COURT: All right. But in his official capacity,
15 not in his personal capacity.

16 MR. BIENERT: Well, we're asking to do it in the
17 personal capacity because he's a friend, but we would do it in
18 whatever -- it could be in his official capacity.

19 THE COURT: Yes, in his official capacity as chief of
20 police. That's all.

21 Any objection to that as a bail condition?

22 MR. IMPERATORE: Not so long as it's surrendered to
23 him in his official capacity, your Honor.

24 THE COURT: All right. So that, I think, is taken
25 care of.

GBHABERAPS

1 What I'm going to do is, I'm going to accept the bail
2 package, with the qualification as to surrender of the firearms
3 to the chief of policeman of Manassa, if I'm pronouncing it
4 correctly.

5 MR. BIENERT: Manzanita, your Honor.

6 THE COURT: Manzanita. And I'm going to direct the
7 government to get an order to me today with the bail
8 conditions.

9 And as to travel, the defendant is going to have to
10 make application to me if he wants to travel beyond California
11 to the Southern and Eastern District of New York. So I'm
12 denying nationwide travel. It's important that I know and
13 Pretrial Services know if he is not going to be where we expect
14 him to be. So you can do it by letter application. I think
15 you'll find that, in most instances, I can act on it pretty
16 quickly. So that's what I'm doing.

17 Now, is there anything with regard to Mr. Wellner's
18 bail that's been set already?

19 MR. IMPERATORE: No, your Honor. It's already been
20 set.

21 THE COURT: OK. Anything further from the government?

22 MR. IMPERATORE: Yes, your Honor, the exclusion of
23 time. The government will move to exclude time between 20th
24 and the next conference date, which is January 19, in the
25 interests of justice, to allow the defendants to review the

GBHABERAPS

1 discovery the government will produce and to consider any
2 motions.

3 THE COURT: All right. Any objection?

4 MR. BIENERT: No, your Honor.

5 MR. KLEIN: No, your Honor.

6 THE COURT: OK. I find that the ends of justice will
7 be served by granting a continuance to January 19 and that the
8 need for a continuance outweighs the best interests of the
9 public and the defendant in a Speedy Trial. The reasons for my
10 finding are that the time is needed to enable the government to
11 make discovery available, for defense counsel to review it and
12 discuss it with their clients, and to return to this court to
13 advise if there are any motions they wish to make in this case.
14 And accordingly, the time is excluded between today and
15 January 19.

16 Anything further from the defendants?

17 MR. BIENERT: Yes, your Honor. The one thing I want
18 to make sure we have is a date by which we will finish the
19 various components of bond, the most significant of which is
20 getting the property deeded to the court, and I think we had
21 spoken about two weeks, if I'm not speaking out of turn, but
22 just to get a date on the order.

23 THE COURT: Mr. Imperatore, is that --

24 MR. IMPERATORE: That's fine, your Honor.

25 THE COURT: Do we have the Thanksgiving holiday in

GBHABERAPS

1 there?

2 MR. IMPERATORE: Yes. That's fine and consistent with
3 our discussions with defense counsel.4 THE COURT: All right. So that would put it at
5 December 1.6 MR. IMPERATORE: Correct. And the defendant will be
7 released today.

8 THE COURT: Yes. All right.

9 Anything further?

10 MR. KLEIN: Not for Mr. Wellner, your Honor.

11 THE COURT: All right. Thank you all very much.

12 MR. BIENERT: Thank you, your Honor.

13 MR. KLEIN: Thank you, your Honor.

14 ooo

15

16

17

18

19

20

21

22

23

24

25